

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

2:10-CV-874 JCM (PAL)

MANUEL MAIRS, an individual; and
JACQUELINE MAIRS, an individual,

Plaintiffs,

v.

ROBERT BECKETT, et al.,

Defendants.

ORDER

Presently before the court is plaintiffs Manuel and Jacqueline Mairs' renewed motion for leave to file a second amended complaint based on newly discovered evidence, dated December 5, 2010 (doc. #36). Defendants Robert Beckett and Frank Toppo filed an opposition to plaintiffs' motion (doc. #41) as did defendant Nye County (doc. #43). Also before the court is defendant Nye County's notice of pending motion to dismiss or, alternatively, to consolidate a parallel action¹, dated December 12, 2010 (doc. # 37; previously doc. #5). Plaintiffs filed a response (doc. #46; previously doc. #8) and Nye County filed a reply (doc. #48; previously doc. #12). Lastly before the court is defendant Robert Beckett's motion to dismiss or for judgment on the pleadings pursuant to Federal Rule Civil Procedure 12 (doc. #45; previously doc #19). Plaintiffs filed a response (doc. # 51) and defendant Beckett filed a reply (doc. #54).

I. RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiffs filed two separate suits, one in federal court and one in state court. Plaintiffs' first

¹ Case No. 2:10-cv-01290-GMN-PAL

1 complaint was filed pursuant to 42 U.S.C. § 1983 in United States District Court, District of Nevada,
2 Case No. 2:10-cv-00874-JCM-PAL (hereinafter “874 case”) on June 7, 2010. (*See* doc. #1). The 874
3 complaint names Nye County, Robert Beckett and Frank Toppo as defendants. (*Id.*). Plaintiffs filed
4 an amended complaint in the 874 case on June 29, 2010. (*See* doc. #8).

5 Plaintiffs then filed a second suit in the Fifth Judicial District Court, Nye County, Nevada
6 Case No. CV 30433. This case was removed to the United States District Court, District of Nevada,
7 Case No. 2:10-cv-01290-GMN-PAL (hereinafter “1290 case”) on July 30, 2010. The 1290 complaint
8 names Nye County, Robert Beckett and Frank Toppo as defendants. (*See* doc. #1). The complaint
9 in the 1290 case is identical to the amended complaint filed in the 874 case. (*See* doc. #8).

10 Plaintiffs then filed a motion for leave to file a second amended complaint in the 874 case
11 (doc. #21) and a motion to stay ruling on defendants’ motion to dismiss (doc #5) pending resolution
12 of the motion to file a second amended complaint. On November 4, 2010, this court held a noticed
13 hearing on plaintiffs’ motion to file a second amended complaint and subsequently issued an order
14 denying plaintiffs’ motion (doc. #35).

15 Plaintiffs now renew their motion for leave to file a second amended complaint
16 based on newly discovered evidence (doc. #36). Save a newly attached declaration, plaintiffs’ motion
17 is identical to their first motion to file a second amended complaint that this court denied (*compare*
18 doc. #21 *and* doc. #36, *see also* doc. #35 denying plaintiff’s motion). Plaintiffs’ motion requests the
19 following changes: (1) amend characterization of the defendants, official versus individual; (2) add
20 two defendants: Thomas J. Gibson (attorney for defendant Frank Toppo) and his law firm, Gibson
21 & Keuhn, LLP; and (3) add a cause of action for injunctive relief.

22 On December 2, 2010, plaintiffs obtained the sworn declaration of Amy Jo Pearsall, Assistant
23 City Attorney for the City of Federal Way, Washington. (Doc. #36, Exhibit A-1). Ms. Pearsall
24 recounts a phone conversation that took place “[i]n the summer of 2010” with a female caller who
25 indicated that she was calling from the office of a Thomas J. Gibson—attorney for defendant Frank
26 Toppo. (*Id.*). The caller requested a transfer of files on a then non-existent “lawsuit or investigation”
27 against defendant Manuel Mairs that was supposedly under way in Nye County, Nevada. (*Id.*).
28

1 Plaintiffs argue that this declaration is sufficient to overcome this court's previous denial of
 2 plaintiffs' request to add Mr. Gibson and his law firm pursuant to the pleading standard required
 3 under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
 4 1949 (2009). (*See* doc. #35).

5 Finally, on January 10, 2011, the Honorable Gloria M. Navarro issued a judicial
 6 order—contingent on the approval of this court (doc. #22 in the 1290 case)—affirming defendant
 7 Nye County's motion to consolidate the 1290 case and the 874 case, with the 874 case serving as the
 8 base case.

9 **II. PLAINTIFFS' RENEWED MOTION FOR LEAVE TO AMEND**

10 As a threshold matter, plaintiffs' addition of unidentified "Roe" and "Doe" defendants (*see*
 11 plaintiffs' proposed amended complaint, doc. #36, Exhibit B) is improper. *See Buckheit v. Dennis*,
 12 713 F.Supp. 2d 910, 918 n. 4 (N.D. Cal. 2010) (noting the tactic is generally not permitted in federal
 13 court) (citing *Bogan v. Keene Corp.*, 852 F.2d 1238, 1239 (9th Cir. 1988); *see also Fifty Assocs. v.*
 14 *Prudential Ins. Co.*, 446 F.2d 1187, 1191 (9th Cir. 1970); *McMillan v. Dep't of the Interior*, 907
 15 F.Supp. 322, 328 (D. Nev. 1995) (holding there is no provision in the federal rules permitting the
 16 use of fictitious defendants).

17 A court may freely grant leave to amend where justice so requires. FED. R. CIV. P. 15(a)(2).
 18 The power to grant leave to amend is entrusted to the discretion of the district court. *See William*
 19 *v. Richfield Co.*, 588 F.3d 659, 669 n.8 (9th Cir. 2009); *see also Manzarek v. St. Paul Fire & Marine*
 20 *Ins. Co.*, 519 F.3d 1025, 1035 (9th Cir. 2009) (a court can deny a motion to amend if it can articulate
 21 a reason for its denial).

22 Under the broad discretion given to this court under the Federal Rule of Civil Procedure
 23 15(a)(2), plaintiffs' request to amend characterization of defendants Robert Beckett and Nye County
 24 is granted. Additionally, plaintiffs' request to add a claim for injunctive relief against Frank Toppo
 25 is granted. However, plaintiffs' request to add Mr. Gibson and his law firm as defendants is denied
 26 for the following reasons.

27 Plaintiffs' argument in favor of adding Mr. Gibson and his law firm as defendants herein
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1 hinges on the newly proffered declaration of Ms. Pearsall. However, the decision to add Mr. Gibson
 2 is not without consequence to defendant Toppo; the effect of adding Mr. Gibson and his law firm
 3 as defendants would compel the removal of Mr. Gibson as defendant Frank Toppo's counsel.
 4 Ultimately, Ms. Pearsall's declaration is not sufficient to ensnare Mr. Gibson as a defendant and
 5 deprive Mr. Toppo of his counsel because Ms. Pearsall's declaration only confirms that *anyone* could
 6 have contacted her and claimed to be from Mr. Gibson's office.

7 The removal of opposing counsel requires more than a nebulous allegation (substantiated by
 8 declaration or not) that an unknown caller, who claimed she was calling from the office of opposing
 9 counsel, requested a "file transfer" concerning plaintiff. Holding otherwise risks opening the door
 10 to numerous requests for removal of counsel based on similarly vague allegations. Even taking into
 11 account Ms. Pearsall's newly acquired declaration, plaintiffs' proposed addition of Mr. Gibson and
 12 his law firm to the suit fails to "raise a right to relief above the speculative level" and is denied.
 13 *Twombly*, 550 U.S. at 545.

14 **III. DEFENDANT NYE COUNTY'S MOTIONS TO DISMISS OR, ALTERNATIVELY,**
 15 **TO CONSOLIDATE**

16 This court adopts Judge Navarro's order that defendant Nye County's motion to dismiss be
 17 denied and Nye County's motion to consolidate the 1290 case and the 874 case be granted, with the
 18 874 case to serve as the base case (*see* doc. #22 in the 1290 case).

19 **IV. DEFENDANT ROBERT BECKETT'S MOTION TO DISMISS OR FOR JUDGMENT**
 20 **ON THE PLEADINGS PURSUANT TO RULE 12**

21 Pursuant to this court's decision to allow plaintiffs' leave to amend with regard to
 22 characterization of defendant Robert Beckett, defendant's motion to dismiss or for judgment on the
 23 pleadings pursuant to Federal Rule Civil Procedure 12 is denied as moot at this juncture.

24 Accordingly,

25 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs' renewed motion
 26 for leave to file a second amended complaint (doc. #36) is GRANTED in part and DENIED in part.
 27 Plaintiffs may re-characterize their identification of defendant Robert Beckett to include suit against
 28

1 him in his "individual and official capacities," and plaintiffs may add a cause of action for injunctive
2 relief against defendant Frank Toppo. However, plaintiffs may not add Mr. Gibson or his law firm
3 as defendants herein and Does 1-100 are dismissed from this action.

4 IT IS FURTHER ORDERED that defendant Nye County's motions to dismiss (doc. #37) is
5 DENIED; however, the defendants' motion to consolidate (doc. #37) is GRANTED. Case no. 2:10-
6 cv-00874-JCM-PAL and 2:10-cv-01290-GMN-PAL are hereby consolidated, with case no. 2:10-cv-
7 00874-JCM-PAL serving as the base case. On January 10, 2011, the Honorable Gloria M. Navarro
8 issued an identical order contingent upon "Judge Mahan's approval" (*see* doc. #22; 2:10-cv-01290-
9 GMN-PAL). Approval is hereby given.

10 IT IS FURTHER ORDERED that defendant Robert Beckett's motions to dismiss or for
11 judgment on the pleadings pursuant to Federal Rule Civil Procedure 12 (doc. #45) is DENIED as
12 moot.

13 DATED February 17, 2011.

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16 **UNITED STATES DISTRICT JUDGE**